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# TRADE ASSOCIATIONS AND THE GOVERNMENT

BY GILBERT H. MONTAGUE

LESS than four years ago, the Government was fervently urging business men everywhere to combine with their competitors into trade committees or trade associations in order to stabilize supply and demand, restrict competition, and even agree upon prices, in coöperation with the United States Fuel Administration, the United States Food Administration, and the War Industries Board. To the Chamber of Commerce of the United States, for its part in bringing about these organizations, the Council of National Defense accorded the highest official praise. Two hundred such committees, the Council reported, were at work in 1918, speaking "for industries as diverse as the manufacture of toys and the refining of petroleum", and taking "a very important place in the fixing of prices, which has become a well-developed governmental function under the Council and the War Industries Board".

The War Industries Board also added its commendation. "In line with the principle of united action and coöperation," it said, "hundreds of trades were organized for the first time into national organizations, each responsible in a real sense for its multitude of component companies, and they were organized on the suggestion and under the supervision of the Government. Practices looking to efficiency in production, price control, conservation, control in quantity of production, etc., were inaugurated everywhere. Many business men have experienced during the war, for the first time in their careers, the tremendous advantages, both to themselves and to the general public, of combination, of coöperation and common action, with their natural competitors."

Coöperation in industry won the Great War, and many hoped that in peace the lesson would be remembered. "We must give

a freer course to coöperation in industry," declared Mr. Charles E. Hughes, now Secretary of State, in December, 1918. "We need progress in standardization, the elimination of unnecessary waste, opportunities for trade agreements which are helpful alike to the manufacturer, the consumer and the laborer by providing stable provisions. The War has compelled coöperation and the Government, under this compulsion, has fostered what it previously denounced as criminal. The conduct which had been condemned by the law as a public offense was found to be necessary for the salvation of the Republic. But the public need so dramatically disclosed by the War is not, in this respect, removed by the termination of the War. Coöperation is just as necessary to secure the full benefits of peace as it was to meet the exigencies of War. And without it we shall miss the great prosperity and advance in the <sup>world</sup> to which, with our skill and energy, we are entitled."

Almost four years have now passed, but no change has been made in our laws regarding coöperation.

Discussing the so-called "open competition plan" of the American Hardwood Manufacturers' Association, the Supreme Court has recently declared that it is criminal for a trade association to collect and disseminate information among its members regarding supply and demand and prices, if in the association's meetings and bulletins the members are told how they may best act upon this information. "It is plain," said the Supreme Court in its decision, "that the only element lacking in this scheme to make it a familiar type of the competition-suppressing organization is a definite agreement as to production and prices. But this is supplied: by the disposition of men 'to follow their most intelligent competitors', especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of 'harmony' of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals."

Hundreds of trade associations, including some of the largest and most successful, do not attempt to collect or disseminate information regarding supply or demand or prices, and in their meetings and bulletins avoid all discussion of these topics. To such trade associations, this Supreme Court decision had no application. How numerous, however, are the trade associations which this decision might possibly affect may be guessed from a few official figures.

In response to a questionnaire of the Federal Trade Commission last fall, 376 trade associations reported that they were collecting and disseminating statistics regarding stocks on hand, quantities produced, orders received, or orders on hand, and 141 trade associations reported that they were collecting and disseminating statistics regarding prices in closed transactions. "Nine associations," reported the Commission, "indicate that they have recently discontinued the collection and exchange of information regarding their selling prices, pending the decision of the United States Supreme Court in the Hardwood case. It appears probable that a number of others which formerly used such open price methods had taken similar action." This price information, the Commission found, was circulated daily, weekly or monthly by associations comprising manufacturers and wholesalers, and covered, among other products, automobiles, trucks, agricultural products, bread, bakery products, brick, buttons, canned fruits, canned vegetables, clothing, coal, coke, cotton goods, dairy products, drugs, farm implements, flour, feed, furniture, gas ranges, groceries, meats, hardware, lumber products, iron shingles, plumbing materials, salt, shoes, silks and upper leather.

These trade associations, as has been said, are only a fraction of all the trade associations in the country. Few, even of these, are probably as vulnerable as was the Hardwood Manufacturers' Association. Making all these allowances, however, the number of business men threatened by this Supreme Court decision is alarmingly large. And since their technical criminality, if it exists, arises only from their interchange of information regarding supply and demand and prices, and suggestions as to how best to act upon this information, their predicament deserves thoughtful consideration.

As Edmund Burke long ago declared, you cannot indict an entire nation. Burke's remedy, in an analogous instance, was to repeal the law because it conflicted with national habits. No one, however, seems ready to believe that it is politically possible to repeal the Sherman Act. Compromise measures, therefore, to temper and modify the anti-trust laws, and to permit coöperation under Government supervision, are the only suggestions for legislative relief.

Mr. Hughes, in his address already quoted, endorsed this proposal in general terms. "Reasonable opportunity," said Mr. Hughes, "for concert under Government supervision is necessary to afford best service and prevent waste, and if we have learned this lesson from recent experiences it will be a great gain. . . . Is it not entirely possible to maintain governmental supervision which will give reasonable opportunity for doing reasonable things instead of seeking to maintain rules of conduct which shackle American enterprise? Neither labor nor the general public gains anything from denying free scope to honest business, and to secure this legitimate freedom it should be the function of Government to provide intelligent supervision which will aim at the detection and punishment of abuse and not at the crippling of opportunities rightly used."

The same idea was more fully discussed by the War Industries Board in its final report. Existing anti-trust legislation, the Board declared, "while valuable for immediate purposes, leaves little more than a moderately ambitious effort to reduce by Government interference the processes of business so as to make them to conform to the simpler principles sufficient for the conditions of a by-gone day." During the Great War, business men learned the value of group action. "To drive them back through new legislation, or through the more rigid and rapid enforcement of present legislation, to the situation which immediately preceded the war will be very difficult in many cases, though in a few it is already occurring spontaneously. To leave these combinations without further supervision and attention by the Government than can be given by the Attorney General's Department, or by the Federal Trade Commission in its present form, will subject business men to such temptations as many of

them will be unable to resist—temptations to conduct their businesses for private gain with little reference to general public welfare.”

Ostensibly to accomplish this general purpose, a bill, sponsored by the Lockwood Committee on Housing, passed the New York State Senate on March 17, 1922, and might have passed the Assembly had the Legislature not adjourned a few days later. This bill forbade any corporation, or corporation official, to participate in any “organization, arrangement, understanding or agreement of, or between, corporations . . . of which actual or potential competitors engaged in the same or similar classes of business are members”, or to participate in any “club, society, institute, exchange, bureau or other body . . . of which such actual or potential competitors are members”, until after the State Department of Trade and Commerce, to be created by the bill, shall have investigated the members, officers, dues, assessments, plans, purposes, methods, practices, constitution and by-laws of such association, and the uses to which its dues and assessments are put, and shall have issued a license authorizing it to transact business. Any corporation, corporation official, or person, the bill provided, who “becomes a party with a corporation” to any activity of any unlicensed association, or does “any act in, toward or tending to the consummation of such purposes of any such unlicensed association” shall, in the case of a corporation, be fined not less than \$1,000 nor more than \$20,000, and in the case of a person, must be imprisoned at least three months and not more than one year, and in addition may also be fined not more than \$20,000.

An association shall not be licensed, the bill continued, if the proposed State Department of Trade and Commerce finds that the association’s activities will

- (1) tend to prevent, restrain, limit or restrict competition,
- (2) tend to fix, prescribe or advise or suggest the fixing of the price of any such article or commodity,
- (3) tend to restrain, limit, restrict or diminish the output or supply, to divide or apportion the territory between actual or potential competitors or to encourage such competitors to keep out of or fail to enter any given territory in competition with one another,
- (4) fail to effect a more beneficent, efficient and economical production,

marketing, transportation or distribution of any such article or commodity in free and open competition,

(5) tends or is calculated to promote or encourage unreasonable profits to any member of such association or to any other person, firm or corporation engaged in a similar business,

(6) is discriminatory between persons or localities or injurious to the interests of the state, or

(7) is in any other manner calculated to interfere with unrestricted competition or is otherwise adverse to the public welfare.

No right of appeal to, or review by, the courts was provided in the bill, in event that an association be denied a license.

Besides the powers above described, the bill entrusted the proposed State Department of Trade and Commerce generally with the "encouragement, development, assurance, protection and regulation" of "free and open competition in the production, manufacture, marketing, purchase, sale, exchange, use, hiring, storing and distribution of any article or commodity in common use", and specifically with investigating the cost of such articles and commodities and "securing the production, manufacture, marketing, purchase, sale, use, hiring, distribution and exchange of such articles and commodities upon a fair basis and at prices regulated solely by competitive conditions, uncontrolled by restraints or restrictions of any kind".

The proposed State Department of Trade and Commerce, according to the bill, would have "full access to and the right to inspect and take copies of all books of account, documents, correspondence and other papers relating to the business and affairs of all corporations, joint stock associations, trade organizations and other bodies", whose activities in any way comprise or affect trade or commerce within the State.

Desirable as are coöperation, trade associations, and exchange of trade information, may not their price be too high? Is not Government regulation of prices and profits an excessive concession to ask of any non-public industry in time of peace? Where is the responsibility when the State regulates prices and profits in all industries? Our war-time experiments with Government price fixing, supported though they were by patriotism and the national emergency, were nevertheless all so unsatisfactory

that immediately after the Armistice they were wholly abandoned with universal relief. Would any industry, for the privilege of coöperation, ever concede such power to a Government Department? And what Government Department would ever dare approve in advance any arrangement that might result in the maintenance or raising of prices? If some unforeseen consequences were to follow, the standing and even the existence of the Department might be imperilled. Approval of any agreement in advance would always be full of risk. Withholding of approval would always be the only way of avoiding risk. Can there be any doubt as to how any Government Department would view requests for such approval? Few requests if any would ever be granted, except in circumstances so special that the same result, under competent legal guidance, would probably be obtainable without resort to any of the machinery suggested in the bill above analyzed.

A better solution seems to lie in a direction suggested by the Secretary of Commerce, Mr. Hoover. "We should have," said he recently, "more timely, more regular and more complete information of the current production and consumption and stocks of every great commodity in the United States."

Secretary Hoover cited two illustrations, the coal boom in the fall of 1920 and the rubber slump in 1920 and 1921. "If the public," said he, "had realized that our stocks of coal on the surface were probably above normal, that at the time they were bidding for coal at \$15 per ton, the actual realization at the mine was probably less than \$4; if they had been aware that the capacity of the coal mines was even then not running over 80 per cent; that the limitation of supply was due to railway difficulties which would be solved with a little patience; then, I am convinced that many sensible people would have stayed out of the coal market, and that we should have had no buying panic, with its profiteering, its consequent slump and great losses." If in the rubber industry, continued Secretary Hoover, "there had been an accurate monthly statement of the current ratio of production capacity and operation in the different branches of the industry, and of the stocks of major manufactured and raw materials in hand, they would have been saved tremendous losses



not only in over-accumulation of goods, but also in over-expansion of equipment."

Though some statistics are now being collected and published by the Departments of the Interior, Agriculture, Commerce and Labor, the Federal Trade Commission and the Federal Reserve Board, statistics of the detail and freshness that Secretary Hoover mentions can most readily be gathered and disseminated only by trade associations. Business men dislike the intrusion of the Government into business, and the question of whether Federal Government bureaus, whose jurisdiction is limited to interstate commerce, can legally require periodical information relating to production and prices and other matters primarily in intrastate commerce will, for a long time, continue to embarrass the Federal Government if it attempts any compulsion in collecting such information.

Now that a trade association, according to the Supreme Court, cannot legally gather and disseminate such information, if in the association's meetings and bulletins the members are told how they may best act upon it, perhaps business men will be more willing than before to report such information to Government bureaus. Legislation may eventually be necessary, but meanwhile, even under the present state of the law, there seems to be a field for joint action between the trade associations and the Government.

In the Hardwood case, the mischief began when the Association in its meetings and bulletins tried to instruct its members how best to act upon trade information. May it not, therefore, be possible for trade associations merely to collect such trade information from their members, and to distribute it not only among their members but also among the Government bureaus, the trade press, the daily newspapers so far as they are interested, and the fast growing number of statistical service organizations that in recent years have sprung up for the purpose of interpreting to business men the tendencies and developments in business throughout the country?

No development in business life is more significant than the increase of financial and industrial services that furnish information to enable business executives to take their bearings and

determine their course according as conditions develop from week to week in their industries, their markets, their country and the entire world. The trade press, and even the daily newspapers, are undertaking more and more of this work, and many of the larger banks and trust companies, as a matter of service to their clients, now maintain large statistical organizations and publish monthly business reviews. With these rapidly increasing facilities for the expert interpretation of trade statistics, entirely insulated from any control or influence by the trade associations that merely collect and disseminate the figures, business men ought now to be able to obtain the knowledge they need in order to run their businesses.

To further this purpose, Secretary Hoover, on February 16, 1922, made public his correspondence with the Attorney-General of the United States regarding trade association activities. This correspondence endorses many activities, such as standardization of quality, grades and technical designations, elimination of wasteful processes, prevention of dishonest practices, handling of group insurance, coöperative advertising, promotion of welfare work, coöperative representation on legislative questions and transportation matters, and coöperation with Government departments and bureaus, that have never been legally questioned. Most interesting of all, however, are the Government's views on the interchange of trade information through trade associations.

Briefly, the Attorney-General advises the Secretary of Commerce that if there be no purpose or effect, whether intentional or unintentional, of curtailing production, enhancing prices or suppressing competition, trade associations may—

(a) collect statistics from each member showing his volume of production, his capacity to produce, the wages paid, the consumption of his product in domestic or foreign trade, and his distribution thereof, specifying the volume of distribution by districts, together with his stock, wholesale or retail;

(b) on receipt of the individual reports of each member, compile the information in each report into a consolidated statement which shows the total volume of production of the membership, its capacity to produce by districts of production, which, in some instances, include a state or less area, the wages of districts of production, the consumption in foreign or domestic trade by districts, the volume of distribution by districts, and the stocks on hand, wholesale and retail, by districts;

(c) file the combined statement with the Secretary of Commerce for distribution by him to the members of the association through the public press or otherwise and to the public generally and to all persons who may be in any way interested in the product of the industry, it being understood that the individual reports for the members should cover either weekly, monthly, quarterly, or longer periods as may be deemed desirable by the members, and, when a period is adopted, the report for each member shall cover that period, and the combined report shall be for that period;

(d) have their members report the prices they have received for the products they have sold during the period taken, specifying the volume of each grade, brand, size, style, or quality, as the case may be, and the price received for the volume so sold in each of the respective districts where the product is sold;

(e) consolidate all of the reports into one, and show the average price received for the total volume of each grade, brand, size, style, or quality, as the case may be, distributed in each district covered by the distribution statistics for the period covered by each individual report; and

(f) send the compiled report as to average price, as aforesaid, to the Secretary of Commerce, to be by him distributed to the public and to any or all persons who may be interested in the particular industry making the report.

That Secretary Hoover is ready and willing, and that his Departmental facilities are adequate, to disseminate promptly and periodically all information collected by trade associations and filed with him for distribution as above proposed, is the promise held out as the result of conferences held by Secretary Hoover in Washington in April, 1922, with representatives of most of the trade associations in the country. Unquestionably, this is the most ambitious project for Governmental assistance to business ever proposed in this generation.

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